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93-353 No.——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FELTON HALE and RICHARD S. BERRY,
Petitioners,
v.
STATE OF ARIZONA, *et al.*,
Respondents.
and
JOHN LEROY FULLER, *et al.*,
Petitioners,
v.
STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 1, 1993

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QUESTION PRESENTED

Whether state inmates who work in correctional industries programs producing goods and services for interstate commerce are excluded from the coverage of the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) and are therefore not entitled to payment of the federal minimum wage.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed are the following:

A) Plaintiff and petitioner in the first case is Richard S. Berry. The defendants and respondents are the State of Arizona, ARCOR Enterprises (ARCOR), a subdivision of the State of Arizona, Arizona Correctional Industries (ACI), a subdivision of the State, and statutory successor to ARCOR, James Ricketts, former Director of the Arizona Department of Corrections (DOC), Samuel Lewis, Director of the DOC, Marilyn Wilkens, Director of ACI, Thomas Lescault, Director of ARCOR, Tony West, David Tierney, Earl Cobb, Thomas Donnelly, Henry Evans, Marcus Englemen, Delbert Householder, and Ray Shaffer, members, board of directors, ARCOR.

B) The plaintiffs and petitioners in the second case are John Leroy Fuller and 296 other inmates whose suits were consolidated by the trial court with the *Fuller* suit.* The defendants and respondents in the second case are the same defendants listed for the *Hale* case, and the following additional persons: Richard Orberg, Kenneth Van De Veer, John F. Wright, James Kinsella, Gilbert Evans, Ralph Cluff, Michael Ullery, all of whom are or were non-inmate employees of ARCOR or ACI.

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* A complete list of these 296 consolidated plaintiffs is provided at Pet. App. 107a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard S. Berry, John Leroy Fuller, and their co-appellants below hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals (Pet. App., *infra*, 1a) is reported at 993 F.2d 1387 (9th Cir. 1993). The initial panel opinion (Pet. App. 41a) is reported at 967 F.2d 1356 (9th Cir. 1992). The opinion

and judgment of the district court in *Fuller* v. *State of Arizona* (Pet. App. 71a) and the opinion and judgment of the district court in *Hale* v. *State of Arizona* (Pet. App. 89a) are unreported.

JURISDICTION

The *en banc* opinion of the court of appeals was entered May 4, 1993. Pet. App. 1a. The time within which to file a petition for a writ of certiorari was extended by Justice O'Connor until September 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3 of the Fair Labor Standards Act provides in relevant part:

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.
>
> (g) "Employ" includes to suffer or permit to work.

29 U.S.C. § 203.

Section 6 of the Fair Labor Standards Act provides in relevant part:

> (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following [prescribed minimum] rates . . .

29 U.S.C. § 206.

STATEMENT

1. Petitioners are a group of inmates in Arizona correctional facilities who seek to recover the federal minimum wage for work performed in state prison industries programs that produce goods and provide services in interstate commerce. Under Arizona's penal system, all inmates are obliged to work 40 hours a week at "hard labor." Ariz. Rev. Stat. § 31-251(A). This work can be done in a correctional industries program if the inmate elects to work in that program and is approved by the prison. Inmates can also work in a menial capacity (called, in Arizona, the WIPP program) for $.08/hour sweeping dining halls, cutting the grass, and performing similar purely intra-prison tasks.

None of the petitioners seek compensation for any work performed in the WIPP program, which does not produce goods or provide services that enter interstate commerce. Rather, petitioners all work or worked for Arizona Correctional Industries, or ARCOR.[1] The ARCOR program, which is divided into several "enterprises" and is run by the Arizona Department of Corrections ("DOC"), is a statutorily created prison program (Ariz. Rev. Stat. § 41-1621 *et seq.*), able to purchase raw materials "for use in the manufacture of products for sale." *Id.*, § 41-1622, as amended 1984. State law authorizes the DOC to enter into contracts (*Id.*, § 41-1624.01(B)), to promote ARCOR goods and products "consistent with sound marketing principles" (*Id.*, § 41-1628), and otherwise to do everything that a privately-run business can do.

In order to get an available ARCOR position, inmates must (a) apply to the prison for the position; (b) be acceptable to the prospective department or division of ARCOR to which they are applying (*i.e.*, have

[1] In 1987, the legislature changed the name of ARCOR to Arizona Correctional Industries (ACI). As the courts below did, this petition uses the older name of "ARCOR."

the requisite skills); and (c) achieve certain institutional classification clearances with respect to security and other penological matters. Ten to twenty percent of the state's prisoners work for ARCOR enterprises producing goods (such as clothing, fabricated steel, livestock, and dairy products) and providing services (such as hotel reservation services for Best Western motels) in interstate commerce. Pet. App. at 5a.

One of ARCOR's goals is to enable inmates working in these programs to make money selling products to allow "restitution to victims," "provide assistance to their dependents, thus tending to strengthen family ties," and to "accumulate savings for . . . eventual return to the community." Arizona Laws 1978, chap. 164, § 29. That goal complements state law, which provides that all wages an inmate receives in excess of $.50 cents per hour must be used for victim restitution, reimbursement of the state for room and board, and payment of child support and for the support of other dependents. Ariz. Rev. Stat. § 31-254(E).

a. Petitioner Richard Berry was an Arizona inmate who worked from early September, 1984, through May, 1985 in ARCOR's Inmate-Owned Business Enterprise program (IOBE). Under this program, selected inmates can organize and operate businesses and sell goods "to the public" under ARCOR supervision. *Id.*, § 41-1628, as amended 1978. Petitioner Berry was employed as the shipping and receiving clerk and office manager of "C A Buckles," an IOBE business owned by another inmate.

C A Buckles manufactured and sold custom designed rodeo and "logo" western-style belt buckles and jewelry. It was listed in several telephone books in the three largest Arizona metropolitan areas and had three direct telephone lines to the outside world. Its customers, both on a one-time and repeat basis, included the U.S. Marine Corps at El Toro, California; Mountain Bell Telephone

Company in Phoenix, Arizona; Speed-O-Fam in London, England; U-Haul International in Tempe, Arizona and Las Vegas, Nevada; Butler Buildings in Kansas; a California movie company; numerous Jaycee chapters in the State of Arizona and elsewhere; and many annual rodeos held both within and outside of the state. C/A Buckles also sold its wares to other retailers within and outside of Arizona, and advertised its products in a catalog that was mailed throughout the country.[2]

Berry was paid $50.00 a month, a wage approved by a prison and ARCOR classification committee in the course of approving his employment with C/A Buckles. DOC wage payment policy required the buckle shop (and all other IOBE businesses) to pay to ARCOR or the prison, not the inmate worker, all wages due inmate workers. In turn, the prison paid the inmate workers by depositing into the inmate worker's commissary account the monies given it by the operator for the wages.

b. Petitioner John Fuller and the 296 other inmates whose cases were consolidated with his were employed directly by ARCOR in other ARCOR industries. Fuller and his fellow inmates performed agricultural production, made license plates for other states, manufactured wooden toys, and worked in the construction industry in the state outside the prison walls. These products were marketed by an ARCOR non-inmate sales force via a catalog sent throughout the country.

ARCOR submitted bids to prospective buyers and contractors for goods and services. Many products were produced pursuant to long-term supply contracts. For example, Farmer John Meats, a California meat packing and processing firm, bought all stock produced on the ARCOR hog farm.

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[2] ARCOR in general has the power to produce and disseminate a catalog of its goods to make them "accessible to . . . the public." Ariz. Rev. Stat. § 41-1628.

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Like petitioner Berry, Fuller and his fellow inmates had to apply for their jobs, achieve a security clearance, and be assigned by the prison to the correctional industries program at a pre-set wage approved by ARCOR and the prison. Neither Fuller nor any of the other inmates were paid the minimum wage provided for by federal law.

2. Petitioners brought separate suits in the United States District Court for the District of Arizona seeking minimum wages under the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201 *et seq.*), Section 1983 (42 U.S.C. § 1983), and Arizona state law. In the *Hale* action, in which petitioner Berry was a plaintiff, the district court granted summary judgment in favor of all defendants on the grounds that (1) there was no employer-employee relationship under the FLSA and (2) the Eleventh Amendment deprived it of jurisdiction over the state and federal claims for money damages. Pet. App. at 71a. A different district court consolidated petitioner Fuller's case with 296 other similar suits (the *Fuller* case) and dismissed for lack of jurisdiction all claims except the § 1983 claim for injunctive relief against state officers. With respect to that claim, the court stayed further proceedings pending appeal of its order of dismissal. Pet. App. at 88a.

The Ninth Circuit consolidated the two appeals.[3] In the initial decision, a panel of the Ninth Circuit concluded that the Eleventh Amendment did not bar petitioners' claims under the FLSA, and that all of the petitioners were employees within the meaning of that Act. The panel found that Congress had expressed its unmistakable intent to override the Eleventh Amendment in a 1985 amendment to the FLSA. That amendment, which was prompted by this Court's determination in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), that states

[3] All of the plaintiffs in the *Fuller* action appealed. Only petitioner Berry appealed the district court's decision in *Hale*.

are not immune from federal regulation of their "traditional state functions," gave states until April 15, 1986 to conform to the Act. Pet. App. at 48a. Accordingly, the panel concluded that the FLSA extended to state employees. *Id.*

Turning to the merits of petitioners' FLSA claims, the panel held that prisoners were not *per se* excluded from the Act's coverage. In so ruling, the panel relied on the "striking breadth" of the Act's definition of "employee" and the fact that prisoners are not included among the Act's extensive list of excepted workers. Pet. App. at 49a-50a. In addition, the panel noted that application of the FLSA to inmates who produce goods and provide services in interstate commerce is consistent with Congress' desire to protect both private businesses and employees from being driven out of work by competing products made by unfairly priced labor. Pet. App. at 50a-51a.

Following this Court's instruction that the existence of an employment relationship under the FLSA must be determined in light of the "economic reality" of the situation (see *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)), the panel applied the four-part "economic reality" test first enunciated in *Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). Under that test, courts look at whether the alleged employer (1) had the power to hire and fire, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of compensation, and (4) maintained employment records. Pet. App. at 52a. Examining those factors in the context of the ARCOR programs at issue here, the panel concluded that there was an "employment relationship" between all of the petitioners and the state prison. Pet. App. at 59a-62a.[4]

[4] The panel upheld the dismissal of petitioners' state law claims. It held that all § 1983 claims against the state and the DOC were

The state sought and obtained *en banc* review of the panel's decision. Like the initial panel, the *en banc* court held that the Eleventh Amendment did not bar petitioners' claims under the FLSA and that state prisoners are not *per se* excluded from the coverage of the Act. Pet. App. at 4a, 8a, 12a. Notwithstanding this disavowal of a *per se* rule of exclusion, a majorty of the *en banc* court held that inmates who "worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor[] [are] not 'employees' of the prison." Pet. App. at 17a. Dispensing altogether with the *Bonnete* factors, the court reasoned that "the relationship between prison and prisoner . . . . is penological, not pecuniary." Pet. App. at 15a. It concluded that "the economic reality is that [the prisoners'] labor belonged to the institution," and that petitioners therefore could not be employees within the meaning of the FLSA. Pet. App. at 17a.

Although it acknowledged that "the fact that prison-made goods are sold in interstate commerce implicates congressional concern with unfair competition," the majority opined that "nothing in the FLSA indicates that that fact alone should convert the relationship between prison and prisoner to one of employer-employee such that prisoners working on a program structured by the prison are entitled to a minimum wage." Pet. App. at 20a. The majority thought its views in this regard were buttressed by the Ashurst-Sumners Act (18 U.S.C. § 1761), which criminalizes the interstate transportation of prison-made goods unless prevailing wages were paid for their manufacture. According to the majority, the Ashurst-Sumners Act's more specific treatment of prison-made goods renders the FLSA's unfair competition con-

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likewise barred, but that petitioners were entitled to pursue their § 1983 claims for both injunctive relief and damages against the individual defendants and ARCOR.

cerns inapplicable to prison labor. See Pet. App. at 21a-23a.[5]

Two judges dissented. They argued that the plain language of the FLSA covered petitioners and that nothing in its language or structure supported the implication of an exemption that sweeps in all "prison-structured" inmate labor. Pet. App. at 35a-36a. In addition, the dissenters argued that, because petitioners were unquestionably employed in businesses that competed in interstate commerce, the majority's implied exemption was inimical to the FLSA's goal of eliminating unfair competition and the substandard labor conditions tmat such competition fosters. Pet. App. at 31a-32a. Finally, the dissenters noted that the Ashurst-Sumners Act complemented, rather than supplanted, the FLSA, and thus did not limit the reach of the latter. Pet. App. at 37a-38a.

REASONS FOR GRANTING THE PETITION

The issue raised by this petition—whether inmates who work in prison-structured programs and produce goods that are sold in interstate commerce are "employees" within the meaning of the FLSA—has arisen with increasing frequency and produced a confused and contradictory series of decisions in the circuit courts. Indeed, had the *en banc* majority adopted the rationale employed by at least two other courts of appeals, it would have reached an entirely different result. The decision below, moreover, is inconsistent with the interpretation of the FLSA rendered by the Department of Labor, the agency responsible for administering and enforcing the

[5] The majority also ruled that the state, the DOC and ARCOR are not persons within the meaning of § 1983; that the Eleventh Amendment bars petitioners' claims for monetary damages against the individual defendants; and that the district court properly granted summary judgment on petitioner Berry's claim for injunctive relief under § 1983 against the state officials. Neither these rulings, nor the initial panel's ruling with respect to petitioners' state law claims, are at issue in this petition.

Act. The applicability of the Act to prisoners who manufacture goods for interstate commerce is an issue of national significance that affects not only thousands of inmates across the country, but also tens of thousands of workers and businesses in the private sector that compete with prison-made goods.

1. Six circuits have addressed the question that gives rise to this petition. No fewer than three different rationales have emerged from the decisions of these courts. Under one of these rationales, petitioners would have been deemed employees entitled to receive the minimum wage for their work producing goods for interstate commerce.

Both the Second and Fifth Circuits have held that where prisoners produce goods or provide services in interstate commerce, the inmates' employee status must be determined using the four-part "economic reality" test set forth in *Bonnette*. In *Carter* v. *Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), the Second Circuit noted that a central purpose of the FLSA was "the establishment of minimum standards in the workplace" in order to "eliminat[e] . . . unfair competition." *Id.* at 13. Noting that the exemption of an entire class of workers from the coverage of the Act could "upset[] the desired equilibrium in the workplace" (*id.*), the Second Circuit held that "the fact that [someone] is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA." *Id.* at 15. It therefore remanded the case with instructions that the district court assess the inmate's employee status under the *Bonnette* test.

Relying extensively on the Second Circuit's reasoning in *Carter*, the Fifth Circuit held that "status as an inmate does not foreclose inquiry into FLSA coverage" and that, "in order to determine the true 'economic reality' of the [i]nmates' employee status, we must apply the four factors of the economic realities test." *Watson* v. *Graves*, 909

F.2d 1549, 1554 (5th Cir. 1990). Like the Second Circuit, the Fifth Circuit noted that "[t]he Act was drafted not only to improve living conditions, bargaining strength vis-a-vis employers, and the general well-being of the American worker, but also *to eliminate unfair competition among employers competing for business in the market and among workers looking for jobs.*" *Id.* (emphasis added). Applying the four-part test, the Fifth Circuit concluded that inmates who had been forced to work for an outside contractor were employees of that contractor as a matter of law. *Id.* at 1556. In addition, in stark contrast to the *en banc* court below, the Fifth Circuit deemed the economic reality test equally applicable to the inmates' claims that they were employees of the prison officials who had compelled them to work, but found that those claims failed for lack of sufficient evidence. *Id.* at 1556-57.

Since the Fifth Circuit's decision in *Watson*, two circuits have concluded that the FLSA does not apply to prisoners who work in prison programs that do not produce goods for sale in interstate commerce. In *Miller* v. *Dukakis*, 961 F.2d 7, 9 (1st Cir.), *cert. denied*, 113 S. Ct. 666 (1992), the First Circuit held that sexually dangerous persons working at a correctional treatment center were not employees under the Act. The court explained that "payment of sub-minimum wages to [the inmates] presents no threat of unfair competition to other employers, who must pay the minimum wage to their employees, because the Treatment Center does not operate in the marketplace and has no business competitors." *Id.*

In *Vanskike* v. *Peters*, 974 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993), the Seventh Circuit concluded that the four-part economic reality test did not apply in the case of a prisoner who was compelled to work in the prison as a "janitor, kitchen worker, gallery worker and 'knit shop piece-line worker.'" *Id.* at 806. Although it agreed with the determinations in *Car-*

ter and *Watson* that prisoners are not categorically excluded from the FLSA's coverage (*Vanskike*, 974 F.2d at 808), the Seventh Circuit concluded that, because the inmates' "allegations reveal that he worked in the prison and for the [Department of Corrections] pursuant to penological work assignments, the economic reality is that he was not an 'employee' under the FLSA." *Id.* at 810. The Seventh Circuit was careful to note, however, that Vanskike had "allege[d] only that he worked for the Department of Corrections, and that his labor was 'forced.'" *Id.* at 808. Because the record disclosed only that Vanskike performed "simple service work" within the prison as a "janitor" and "kitchen worker," the court noted that it was 'not at all clear whether Vanskike works to produce goods that are distributed outside the prison." *Id.* at 811.

In the two most recent decisions, including that of the *en banc* majority below, courts have dispensed with the economic reality test even where the inmates were indisputably engaged in interstate commerce. Notwithstanding the fact that, on its face, the decision in *Vanskike* was limited to work that did not affect interstate commerce, the *en banc* majority below, as well as the Fourth Circuit in *Harker* v. *State Use Industries*, 990 F.2d 131 (4th Cir. 1993), *petition for cert. filed*, July 19, 1993 (No. 93-5298), applied the Seventh Circuit's reasoning to inmates who produce goods that are sold in interstate commerce. The majority below acknowledged that "the fact that prison-made goods are sold in interstate commerce implicates congressional concern with unfair competition." Pet. App. at 20a. Nevertheless, it asserted that this fact—which the courts in *Carter*, *Watson* and *Miller* deemed critical—should not "convert the relationship between prison and prisoner to one of employer-employee." Pet. App. at 20a. Instead, like the Fourth Circuit, the majority argued that the Ashurst-Sumners Act, which criminalizes the interstate transportation of prison-made goods that are not produced in certified

prison programs, renders the FLSA's concern with unfair competition inapplicable to prison labor. See Pet. App. at 17a-18a (citing 18 U.S.C. §§ 1761-62); see also *Harker*, 990 F.2d at 134.

The rationale of the majority below and the Fourth Circuit in *Harker* is fundamentally incompatible with that of the Second and Fifth Circuits. Relying on the Ashurst-Sumners Act, the Ninth and Fourth Circuits have dismissed as irrelevant a fact that the Second and Fifth Circuits, as well as the First Circuit in *Miller*, deemed essential to determining the applicability of the FLSA to prison workers—*i.e.*, the impact on competition of goods produced by sub-minimum wage prison labor. Moreover, where the Second and Fifth Circuits have eschewed the use of *per se* rules of exclusion in favor of a case-by-case analysis of whether an inmate is covered by the FLSA, the Ninth and Fourth Circuits have categorically excluded from the Act's coverage all prisoners who are compelled to work in "prison-structured programs." Pet. App. at 14a-16a.[6]

This case, therefore, raises an inter-circuit conflict that the decision in *Vanskike* did not present. The Second and Fifth Circuits have applied the four-part economic reality test only where inmates produce goods or provide services in interstate commerce; because the record in *Vanskike* did not disclose whether this predicate to invocation of the test was satisfied, the Seventh Circuit's refusal to apply the test did not necessarily reflect a departure from the *Carter Watson* analysis. Here, no such evidentiary gap exists. To the contrary, not only did ARCOR products move in interstate commerce, but,

[6] Although the *en banc* majority below stated that it did not hold that the FLSA "categorically excludes all labor of any inmate" (Pet. App. at 10a), it is difficult to imagine how an inmate can work in anything other than a "prison-structured program." For its part, the Fourth Circuit suggested that the FLSA could apply to prison labor only in unspecified "extraordinary circumstances." *Harker*, 990 F.2d at 135.

as the initial panel opinion makes clear, petitioners would have been deemed employees within the meaning of the FLSA had their claims been judged under the economic reality test employed in the Second and Fifth Circuits. See Pet. App. at 15a-16a. The doctrinal conflict, therefore, is squarely presented.

2. Not only does the analysis of the majority below conflict with that of Second and Fifth Circuits, it is inconsistent with the interpretation of the FLSA rendered by the Department of Labor, the agency charged with administering the law. Indeed, in view of the deference owed that agency's reasonable interpretation of the Act (see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984)), this conflict alone is sufficient to warrant review by this Court.

Like the Second and Fifth Circuits, the Department of Labor has applied the four-part economic reality test to inmates who manufacture goods for sale in interstate commerce. Letter of Herbert J. Cohen, Deputy Administrator, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (April 16, 1985) at 1-2 (Pet. App. at 101a-102a)[7] (applying the test to inmates who "manufactur[ed] brooms and related items for sale to commercial customers"). The Department has carefully distinguished such situations from those where, as in *Miller* and *Vanskike*, an inmate "does work *for the prison*, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program." Letter of Daniel F. Sweeney, Deputy Assistant Administrator, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (Jan. 21, 1993) at 1 (Pet. App. at 105a) (emphasis added). In the case of such purely intra-prison

[7] Because this letter was obtained through a Freedom of Information Act request, petitioners are able to provide only a redacted copy. The redactions, however, appear to delete only the names of the affected entities.

work, the Department has explained, the FLSA does not apply. *Id.*

As this distinction makes plain, the Department has recognized, like the Second and Fifth Circuits and the dissenters below, that application of the FLSA to prisoners who produce goods for sale in interstate commerce furthers one of the Act's central goals—preventing "an unfair economic or competitive advantage over other employers." Letter of Herbert J. Cohen at 3; Pet. App. at 103a.

The Department of Labor's interpretation ensures that prisoners in different geographic locations will be treated differently until this Court resolves the issue of the proper scope of Section 3 of the FLSA. Some prisons will simply comply with the Department's interpretation while others—primarily those in the Fourth and Ninth Circuits—will rely on the law in their Circuit in refusing to comply with the Act. This inconsistency in the application of a fundamentally important federal statute that promotes fair competition in interstate commerce by regulating employment relations is precisely the type of issue that warrants review by this Court.

The Department's interpretation of the FLSA is particularly significant because the Department also is responsible for ensuring compliance with the Ashurst-Sumners Act. See Ashurst-Sumners Act, 18 U.S.C. § 1761 (requiring the Secretary of Labor to submit annual reports to Congress describing the extent and manner of compliance with 18 U.S.C. § 1761(c)). Thus, while the majority below deemed the FLSA's concern with unfair competition supplanted by the Ashurst-Sumners Act, the agency responsible for administering *both* the FLSA *and* Ashurst-Sumners has perceived no conflict between the two statutes, and has expressly concluded that the FSLA's purposes apply to prison labor.

3. In addition to creating inter-circuit conflicts as well as an interpretive conflict between the judicial and Executive branches, the decision of the majority below is fundamentally flawed. This Court has repeatedly admonished courts to construe the FSLA's operative terms broadly and its exemptions narrowly in order to effectuate the Act's sweeping goals. See, *e.g.*, *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 295-96 (1985); *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 31-32 (1961). In addition, because the Act specifically lists categories of workers who are exempted from its coverage, this Court has reasoned that "[s]uch specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act." *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 517 (1950). Although the majority below paid lip service to these principles, it completely subverted them by engrafting onto the statute a new exemption that broadly excludes from the Act all prisoners who are compelled to work in "programs structured by the prison" (Pet. App. at 12a-17a). As the dissenters noted below, neither the exemption itself, nor the limitations the majority placed upon it, find any support in either the language or legislative history of the FLSA. See Pet. App. at 35a-36a.

The majority's holding, moreover, does violence to one of the Act's central aims. It is undisputed that ARCOR goods, which are made with sub-minimum wage labor, compete in interstate commerce with goods produced by employers who pay the minimum wage or better. As the dissenters explained, an increase in goods "produced by cheap inmate labor inevitably undercuts the bargaining power of the free workers Congress designed the FLSA to protect. . . . [T]he absence of a level playing field between prison and private sector . . . producers will 'spread and perpetuate' unemployment and substandard labor conditions among workers in the private sector." Pet. App. at 31a-32a.

Lacking an economically plausible response to this argument, the majority below deemed this concern of the FLSA inapplicable in light of the Ashurst-Sumners Act. According to the majority, by proscribing the interstate transportation of all prison-made goods except those produced in certified programs, the Ashurst-Sumners Act effectively obviates congressional concern with the unfair competitive impact of goods made with cheap prison labor. Accordingly, the majority reasoned, there is no reason to construe the FLSA as requiring payment of the minimum wage to prison workers. Pet. App. at 17a-20a.

This argument is demonstrably wrong. Whatever the overlap between the two statutes, the Ashurst-Sumners Act does not "occupy the entire field" of prisoner wage regulation, as this very case demonstrates. Although Arizona's IOBE program received a certificate of compliance under 18 U.S.C. § 1761(c), it is undisputed that the prisoners who worked in that program were *not* paid the minimum wage. Contrary to the majority's assertion, therefore, the existence of the Ashurst-Sumners Act does not effectively prevent the unfair competitive effects of cheaply made prison goods, and thus does not render the FSLA's concern with such effects inapplicable to such goods.[8]

Nor is it true that application of the FLSA would render the Ashurst-Sumners Act superfluous. In except-

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[8] Moreover, Congress could reasonably assume that the Ashurst-Sumners Act would not completely eliminate the transportation of goods made with cheap prison labor. In fact, as of 1987, there were 23 non-certified prison industries projects, some of which "place products in interstate commerce . . . and are therefore operating in violation of the interstate commerce prohibition." *Work in American Prisons: The Private Sector Gets Involved*, U.S. Dep't of Justice, Nat'l Inst. of Justice (May 1988) ("*Work in American Prisons*") at 11. In the absence of perfect compliance or enforcement of the Act, of course, the FLSA's competitive concerns continue to apply to prison-made goods.

ing from its general prohibition goods made in designated prison pilot programs, the Ashurst-Sumners Act requires that workers in such programs receive "wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed." 18 U.S.C. § 1761(c)(2). Thus, in all localities in which the "prevailing wage" exceeds the federal minimum wage, the Ashurst-Sumners Act will have independent force by compelling payment of this higher wage.

Indeed, in *Powell*, this Court considered and rejected a virtually identical argument to that relied upon by the majority below. There, the Court concluded that the FLSA extended to employees of government contractors notwithstanding the fact that, two years before passage of the FLSA, Congress had passed the Walsh-Healey Act, which prescribed payment of "prevailing wages" to this very class of workers. The Court explained that, as is true here, there was no evidence that "compliance with one Act makes it impossible to comply with the other." 339 U.S. at 519. In addition, the Court noted that, although in most instances "the 'prevailing minimum wages' required by the Walsh-Healey Act [would be] more advantageous to employees than the minimum wages prescribed by the [FLSA]," "the remedial procedure under the later Act [*i.e.*, the FLSA] [is] generally more advantageous to employees." *Id.* That situation is equally present here: the Ashurst-Sumners Act provides for payment of prevailing wages but includes no private right of action permitting prisoners to recover such wages; the FLSA requires payment of what will usually be the lower minimum wage, but provides private and administrative enforcement mechanisms. See 29 U.S.C. § 216(b) & (c).

In short, as the Labor Department's enforcement of these two Acts makes clear, the FLSA and Ashurst-Sumners Act are not mutually exclusive but rather complementary laws. Accordingly, the latter statute does not limit the reach of the former.

4. The question presented by this petition is a recurring one that affects far more than the petitioners involved in this case. As of 1987, there were 38 private-sector prison industries operating in 26 prisons in 14 states and employing more than 1,000 prisoners. *Work in American Prisons* at v & 17. Many of these prison-based businesses provide goods and services in interstate commerce. Indeed, 10 years ago, prison industries grossed more than $21 million in sales. *The Private Sector and Prison Industries,* U.S. Dep't of Justice, Nat'l Inst. of Justice (Aug. 1985) at 6. By the end of 1986, one Best Western International, Inc. reservation center staffed by Arizona inmates handled 2.5 million calls, representing $72 million in room reservation sales. *Work in American Prisons* at 28. That same year, a Trans World Airlines reservation system operated at a California correctional facility handled approximately $1 million in airline ticket sales. *Id.* at 30.

Paying sub-minimum wages to inmate workers at prison-based businesses that offer goods and services in interstate commerce inevitably gives rise to unfair competition that is harmful to private sector businesses and the employees of those businesses. Although it is impossible to quantify either the number of businesses and employees affected, or the magnitude of the effect, the increasing prevalence of prison-based industries makes clear that a significant segment of the national economy is and has been adversely affected by the decision of the majority below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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